No. 12232

In the United States Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN E. WALLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

JOHN GAVIN
WALTER J. ROBINSON, Jr.
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Yakima, Washington

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SUBJECT INDEX

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STATEMENT REGARDING JURISDICTION

This action was commenced in United States District Court by a grand jury indictment of the appellant, charging him with the theft of property of the Commodity Credit Corporation in violation of 15 U.S.C.A. §714m (c). (Public Law 806 of the 80th Congress, Section 15, Paragraph (c)). (R. 2). The District Court had jurisdiction under 18 U.S. C.A. § 3231.

The appellant was found guilty as charged in the Indictment (R 3), sentenced, and the final Judgment and Commitment entered by the District Court. (R 6, 7).

This case comes within the usual appellate jurisdiction of the United States Court of Appeals upon appeal from a final decision of the United States District Court. 28 U.S.C.A. § 1291. The judgment of the District Court was entered on March 11, 1949, and Notice of Appeal was filed March 17, 1949. (R 7, 8).

STATEMENT OF THE CASE

The appellant was charged in the District Court with violating Section 714m of Title 15 of the United States Code (Public Law 806-80th Congress, Section 15, Paragraph (c)), reading in part as follows:

"(c) Whoever shall willfully steal, conceal, remove, dis-

(All numerical references herein, unless otherwise indicated, are to the pages of the printed Transcript of Record. All italics are supplied by counsel).

> pose of, or convert to his own use or to that of another property owned or held by, or mortgaged or pledged to the (Commodity Credit) Corporation shall, upon conviction thereof, be punished by a fine of not more than five years, or both."

The jury found the appellant guilty as charged, and the principal question involved on this appeal is whether the property in question was "owned" by the Commodity Credit Corporation at the time it was taken by the appellant. The property involved was surplus potatoes which had been sold and delivered to an individual named Charles F. Williamson and paid for by him, pursuant to the provisions of a contract with the Commodity Credit Corporation. (Pl. Ex. 4, R 308). That contract refers to a certain "Form 111—Terms and Conditions for Sale of Fresh Irish Potatoes for Livestock Feed," with the provisions of which Form 111 the purchaser agreed to abide. Form 111 (Pl. Ex. 5, R 310) conained a provision that the *"title* to the potatoes shall not pass to the purchaser until the potatoes delivered are actually fed to the livestock or processed into feed for livestock."

The potatoes in question were diverted by the appellant from livestock feed channels.

The District Court held that although the potatoes had been sold by the Commodity Credit Corporation, delivered to, paid for and hauled away by the purchaser or for his account, they were still "owned" by the Commodity Credit

Corporation until actually fed to livestock or processed into livestock food. Appellant denies this proposition. He contends that the above quoted statute has been improperly applied to this case, that there is no evidence that the potatoes taken by him were then owned by the Commodity Credit Corporation, and that his motions for judgment of acquittal should have been granted by the District Court.

Other questions involved on this appeal are whether there is substantial evidence to sustain the judgment of conviction, and whether the District Court erred in admitting evidence with regard to the appellant's purchase of potatoes from the Commodity Credit Corporation *subsequent* to the offense charged and not related to it.

The appellant Melvin E. Waller is now and for approximately three years last past has been president of the Herrett Trucking Company, which is engaged in general inter-state and intra-state truck hauling. The principal place of business of the company is Sunnyside, Washington. The appellant resides with his family on his twenty-seven acre farm about two miles and a half south of Sunnyside, and in the month of August, 1948, was pasturing about forty head of beef cattle on his farm. (R 184, 186).

One Charles F. Williamson resides on a farm adjoining the appellant's farm, and the appellant and Williamson were very close friends. (R 181, 187). For approximately two years they had handled jointly purchase and sale opera-

tions and activities, had loaned and borrowed many items back and forth, and had jointly engaged in numerous matters with third parties. (R 181, 187).

Wililamson grew potatoes during the 1948 crop season under the potato price support program which was administered by the Commodity Credit Corporation. Under that program, the Commodity Credit Corporation acquired a considerable portion of Williamson's crop of No. 1 potatoes. (Pl. Ex. 1-11, R 22, 286-324).

A few days before the date of the offense charged in the indictment, Williamson called at the Commodity Credit Corporation office at Yakima, Washington, and there signed the order which was in the form of "Announcement No. FV-91-2" (Pl. Ex. 4, R 308), as follows:

United States Department of Agriculture
Production and Marketing Administration

Announcement No. FV-91-2

Contract No. A8pm(Fs)781 Program PC-3b-91-3

ANNOUNCEMENT OF SALE OF FRESH IRISH POTATOES FOR LIVESTOCK FEED

The United States Department of Agriculture and the Commodity Credit Corporation, an agency of the United States within the United States Department of Agriculture (both being hereinafter referred to as USDA), may have fresh Irish potatoes available from time to time for sale as livestock feed. These potatoes will

have been acquired under the Irish Potato Price Support Program.

Potatoes for livestock feed will be sold subject to the terms and conditions set forth in Form FV-111 and at the following prices:

Delivered sacked, Government Point of Purchase or Storage, $.10 cwt. in the State of Washington.

How to Obtain Potatoes for Livestock Feed

Prospective purchaser will fully execute the order as indicated below and after execution will forward this entire form to John Chinn, Purchase Representative, located at 201 Old Court House, Yakima, together with certified check or cashier's check or postal money order payable to the Treasurer of the United States for the full amount of the purchase price for the potatoes he desires to purchase at the applicable price stated above. No order will be filled for less than minimum carloads unless purchaser agrees to accept delivery at the point of purchase by USDA and arranges for his own hauling.

A contract will come into existence with reference to a quantity of potatoes when such quantity is loaded on cars or trucks at shipping point.

/s/ CLAUS W. PETERS,

Representative of the Secretary of Agriculture and Contracting Officer, Commodity Credit Corporation.

ORDER

(To be filled in and signed by prospective purchaser)

I/We the undersigned hereby offer to purchase 11,000 cwt. of fresh Irish potatoes, Government Point of Purchase or Storage, $.10 cwt. in the State of Washington —sacked (strike out phrase not applicable) and war-

rant that the potatoes will be used only for feeding livestock.

Name of Purchaser and Consignee: C. F. Williamson. Date: Aug. 19, 1948. Address: Sunnyside, Washington.

Destination: Sunnyside.

Delivering Carrier: Truck.

Delivery Schedule (date and quantity): 50 ton a day.

I/We agree to take delivery at USDA point of purchase and I/We will do our own hauling.

I/We have read the terms and conditions of this sale as set forth herein and in Form 111, "Terms and Conditions for Sale of Fresh Irish Potatoes for Livestock Feed" and agree fully to abide by such terms and conditions.

/s/ C. F. WILLIAMSON
Signature of Purchaser.

RECEIPT

Receipt is hereby acknowledged of the above order and payment in the amount of $1,100.00 covered by No. 9 4729 and No. 9 4874 Aug. 19 and Sept. 22, 1948. Date: September 22, 1948.

/s/ JOHN CHINN,

Purchase Representative.

The Form 111 (Pl. Ex. 5, R 310), referred to in the last paragraph of the "Order" above set forth, reads as follows:

Form FV-111

United States Department of Agriculture
Production and Marketing Administration
Fruit and Vegetable Branch, Washington, D. C.

TERMS AND CONDITIONS FOR SALE OF FRESH IRISH POTATOES FOR LIVESTOCK FEED

Use: Purchaser agrees to use the potatoes delivered pursuant to his order for the sole purpose of feeding such potatoes to livestock. Title to the potatoes shall not pass to the purchaser until the potatoes delivered are actually fed to livestock or processed into feed for livestock.

Failure or Delay in Deliveries: The United States Department of Agriculture and the Commodity Credit Corporation are hereinafter referred to as USDA. USDA does not guarantee the delivery to purchaser under the order of any specified quantity of potatoes at any specified rate or time, and there shall be no liability on the part of USDA for any failure or delay in filling the order, except that USDA shall refund to the purchaser the price paid with respect to any quantity of potatoes not delivered within a reasonable time after the scheduled delivery date.

Quality and Mode of Delivery: The potatoes to be delivered pursuant to this order are expected to be loaded in bulk. However, USDA reserves the right at its option, to make delivery in bags. At the discretion of USDA the potatoes may be stained by the use of a vegetable coloring which will not affect their use or fitness for stock feed. Quantities shipping by common carrier will be loaded in accordance with applicable regulations governing the use of cars for shipment of potatoes for the purpose for which they were sold. Cars will be loaded with not less than the applicable minimum carload weight. USDA gives no warranty as to

grade, quality or condition of any potatoes to be delivered except that no lot shall have more than 2 per cent soft rot when inspected at government point of purchase. The purchaser shall assume all risk as to grade, quality or condition after such inspection. If sale is made f.o.b. government shipping point, freight charges will be paid by the purchaser. If sale is made f.o.b. destination, freight charges will be paid by USDA.

Over and Under Delivery: Purchaser hereby agrees to pay USDA for any overage in delivery not to exceed 10 per cent of a particular carload or truckload and such payment shall be made within 15 days of receipt of invoices. USDA agrees to refund to the purchaser any amount due because of under-delivery. Determination of weights as established by USDA shall be final.

Determination of Weights: The weight of the potatoes delivered shall be established at the option of USDA on the basis of (a) USDA's purchase weight certificate or (b) cubic measurement as certified by the County Agricultural Conservation Committee, or (c) truck scale weights or (d) number of containers delivered multiplied by net weight per container as determined by USDA.

Records: Representative of USDA shall at any reasonable time have access to purchaser's premises, and other facilities in order to determine that the potatoes were, or are being used in accordance with the terms and conditions of the contract.

Compliance: It is understood that USDA would not deliver potatoes pursuant to this order if the purchaser did not warrant that they would be used only for feeding livestock. Since failure on the part of the purchaser to use the potatoes solely for feeding livestock will cause serious and substantial damage to USDA and since it will be difficult to establish the exact amount of such damage, purchaser agrees if the potatoes are

utilized in any form for human food or for any other purpose except for feeding livestock, to pay USDA in addition to any other charges that may be due USDA with respect to the potatoes, as compensation and not as penalty, liquidated damages at the rate of $4.00 per cwt. or fraction thereof, with respect to any quantity of the potatoes used for human food at the rate of $1.00 per cwt. with respect to any quantity used for purposes other than human food and livestock feeding. If potatoes are used for purposes other than feeding livestock, it shall be presumed that they have been used for human food, and the burden of proving that they have been used for some other purpose shall be on the purchaser. This provision shall not exclude any other form of relief to USDA, at law or in equity, including relief by injunction, in case the purchaser breaches this contract.

Officials Not to Benefit: No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of the contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to the contract if made with a corporation for its general benefit and shall not extend to any benefits that may accrue from the contract to a Member of or Delegate to Congress or a Resident Commissioner in his capacity as a farmer. (41 U.S.C. §22, 18 U.S.C. §204-8).

The said Form FV-111 was never shown to Williamson, his attention was not directed to said form, and no copy thereof was furnished to him. Neither was any reference made to that form by any representative of the United States Department of Agriculture or the Commodity Credit Corporation at any time when he arranged to purchase the potatoes he bought, on August 19, 1948. (R 28, 79-80).

Upon execution of the "Order" and the payment to the purchase representative of $1,000.00, an informal certificate was issued to Williamson by the purchase representative, certifying "that C. F. Williamson has made a contract with our office for 500 tons of potatoes for livestock feed." (Def. Ex. 14, R 327). The said certificate was issued for presentation to potato dealers such as H. H. Simmons & Sons at Sunnyside, Washington, who honored the same by permitting the party named therein or his agent to obtain possession of potatoes then in the dealer's possession subject to the order of the Commodity Credit Corporation. (R 48-79).

The sixteen tons of potatoes which the appellant is charged to have stolen were potatoes which Williamson had purchased pursuant to the above procedure from the Commodity Credit Corporation for $2.00 per ton, and which had been delivered by the Government to Williamson or his agent. (Pl. Ex. 4-11, R 77).

The appellant was not himself a potato grower, though he was interested in his brother-in-law's potato crop. (R 190-201). Williamson had endeavored to persuade the appellant to feed some of Williamson's potatoes to appellant's livestock, but appellant had been afraid that his cattle would be injured by that kind of feed. (R 180-189). Appellant had authority to feed any quantity of Williamson's potatoes he desired to appellant's livestock. (R 180-1, 193).

On Sunday, August 22, 1948, Williamson requested the appellant to help him in hauling Williamson's potatoes from the Simmons Warehouse in Sunnyside, Washington, to the Williamson home ranch pasture near the appellant's farm, where other potatoes (culls) had already been dumped, there empty the potatoes onto the ground for Williamson's cattle, and return the sacks to Simmons. The hauling operations were desired to commence on Monday morning, August 23, 1948, and appellant agreed to provide a truck and driver to assist his friend. Though appellant did not know it, the potatoes to be hauled by him were some which had been purchased by Williamson from the Commodity Credit Corporation. (R 83, 190-193).

As arranged, on the morning of August 23, 1948, one Adamson, a regular driver for the Herrett Trucking Company, drove a flatbed semi-trailer owned by the company to the Simmons Warehouse and loaded the same with potatoes, designated by the Simmons representative as "Williamson potatoes." This driver did not have time during that work day to complete hauling the potatoes to the Williamson ranch, and at about 6:00 o'clock P. M. he parked the truckload of potatoes in an open lot adjoining the Herrett Trucking Company office. (R 193-8).

On that same Monday evening of August 23, 1948, at about 8:00 o'clock P. M., Williamson called the appellant and informed him that one of his, Williamson's, farm trucks

was then loaded with potatoes at the Simmons Warehouse and that he, appellant, could have those potatoes to feed *appellant's* livestock if he would take the truck and unload the same so that the truck and the sacks in which the potatoes were placed would be available to Williamson for Tuesday (August 24, 1948) morning operations. (R 198).

At about 11:00 o'clock P. M. on that same Monday evening, the appellant personally went to the Simmons Warehouse, drove the Williamson farm truck to his, appellant's, farm and with assistance of others fully unloaded the potatoes thereon into appellant's cattle pasture. (R 198-200). No complaint is made by the Government of this procedure or this disposition of potatoes.

Before the appellant unloaded the Williamson potatoes into appellant's cattle pasture, he had no knowledge or information that the potatoes which were being dumped out on the ground for livestock were U. S. No. 1 potatoes. He had assumed that the potatoes that were being fed to livestock were culls or rejects. (R 201).

Appellant was interested in some potatoes being grown on a farm called Hathaway Farms, which was operated by his brother-in-law, and he knew that the potatoes which his brother-in-law was producing were very small and inferior ones so far as the commercial market was concerned. Appellant first checked the situation at the Williamson

pasture to make sure that Williamson had a large quantity of potatoes already lying on the ground. He then decided to take a portion of the potatoes on the Herrett truck and divert them into commercial channels, replenishing the supply for Williamson out of the Hathaway potatoes which were available to him. By doing that, the appellant foresaw that he would at least save the difference in the sorting costs. (R 202).

He anticipated that Williamson would make no objection to that procedure because he had seen large quantities of cull potatoes being delivered by Williamson for his cattle, and he had personally checked to determine that Williamson had a large quantity of potatoes then in his pasture with "cows milling over them, lying in them, standing on them." (R 202).

Appellant then took approximately 100 empty grain sacks from his ranch. With his brother and other personnel he caused the loaded Herrett truck and an empty van truck to be driven to the Williamson home ranch pasture. All the potatoes were dumped onto Williamson's pasture ground except approximately 100 sacks which were emptied into the Waller sacks and loaded into the Herrett Trucking Company van truck. Both trucks were then returned to the Herrett Trucking Company lot. Large lights were set up for this truck operation and there was no attempt at concealment of what was occurring. (R 88, 98). Commer-

cial trucking operations are carried on without regard to regular or daylight hours of work at this time of the year, which is a very busy one. (R 253-4).

The next morning, on Tuesday, August 24, 1948, a driver of the Herrett Trucking Company took the company's flatbed truck to the Majonnier Warehouse in Sunnyside, Washington, loaded it with Williamson potatoes and drove it to the open lot adjoining the Herrett Trucking Company, where it was parked. Thereafter, at about 2:00 o'clock P. M. of the same day and pursuant to the appellant's instructions, other employees of the company transferred approximately 220 sacks of the Williamson potatoes to grain sacks supplied by the appellant and loaded them into the van truck, completing the load. The balance of the potatoes on the semi-trailer truck were driven to the Williamson pasture and dumped on the pasture ground. (R 204). *All these operations were performed openly and with no attempt at concealment or the prevention of surveillance.* (R 238, 241).

The loaded van remained on the open lot of the Herrett Trucking Company until later in the evening on the same day when two of the employees of the company, pursuant to appellant's instructions, drove the truck to Portland, Oregon, where they met one Homer Waller, a brother of the appellant, on the next morning, Wednesday, August 25, 1948. (R 238).

Homer Waller had driven to Portland on other business on the afternoon of August 24, 1948, and the next morning, before meeting the truck, had tentatively arranged to sell the potatoes for appellant to one Joseph Caruso, a produce dealer. (R 204-5, 129).

After inspecting the potatoes Caruso agreed to purchase them for $2.10 per cwt., which was the fair, reasonable price of the potatoes at the time he purchased them. In payment, Caruso gave Homer Waller a check in the sum of $678.30, payable to Hathaway Farms. Caruso having observed that the potatoes were not marked, tags were made out and attached to each sack, each tag having written upon it "U. S. No. 1, Hathaway F. Granger, Wn." (R 131-3).

Hathaway Farms had approximately 50 acres of potatoes planted for the 1948 crop season. (R 192).

The check which Caruso gave to Homer Waller was given to appellant and cashed by him. (R 215).

The transaction was a personal one as to the appellant and was not one entered into on behalf of the Herrett Trucking Company. The drivers who operated the trucks were paid personally by the appellant in cash and the gasoline used by them was charged to the appellant. (R 216-7). The entire transaction was one which was entered into by the appellant through his close personal relation-

ship with Williamson, whom he believed to be the owner of the potatoes in question. *The appellant did not learn of the procedure with regard to purchasing potatoes, nor of any claim made by the Government to own them after they had been sold and delivered for stock feed, until after the date upon which the offense charged was allegedly committed.* (R 164-5, 206, 257-8).

The District Court admitted in evidence testimony to the effect that on Wednesday, August 25, 1948, *two days after the offense charged was allegedly committed,* the appellant contracted with the Commodity Credit Corporation for the purchase of 149 tons of potatoes for livestock feed. (Pl. Ex. 12, R 162, 325). Appellant's brother, Ed Waller, actually arranged the purchase for appellant, and in doing so was required to execute for appellant a contract similar to that which Williamson had signed when he had purchased potatoes for livestock feed on August 19, 1948. (R 256). This evidence was irrelevant, and its erroneous admission was prejudicial to the appellant.

SPECIFICATION OF ERRORS

The District Court erred:

1. In denying the appellant's motions for judgment of acquittal, for the reason that there was no substantial evidence that the potatoes taken by the appellant were *owned*

by the Commodity Credit Corporation at the time they were taken.

2. In denying the appellant's motions for judgment of acquittal, for the reason that there was no substantial evidence that appellant took the potatoes in question *with intent to steal* them from the Commodity Credit Corporation, or from anyone.

3. In denying the appellant's motion for a new trial upon the ground of an erroneous admission of Plaintiff's Exhibit No. 12 in evidence, to the prejudice of the appellant. (R 4-5, 162). Plaintiff's Exhibit No. 12 was the contract for the purchase of potatoes for livestock feed which was entered into by the appellant on August 25, 1948. (Pl. Ex. 12, R 325-7). The objection to this evidence is set forth as follows:

> "Mr. Robinson: Your Honor, these are—I object to them as entirely irrelevant. The dates shown are August 25th; its a purchase form, the same one Mr. Williamson signed, and I think it's Exhibit 4, the purchase dates are August 25 and September 23, 1948, indicating, I think, rather clearly—
>
> The Court: Subsequent to the date of the indictment?
>
> Mr. Robinson: Yes, two days after for one of them, and a month after for the other, and the guilty knowledge must have been shown, if they can show it at all, certainly at the time that any taking was involved, and by their own statement the potatoes were in Portland before this ever occurred." (R 46, 144-9, 162).

ARGUMENT OF THE CASE

I. SUMMARY OF ARGUMENT

The principal contentions of the appellant may be briefly summarized as follows:

A. There is no substantial evidence that the potatoes diverted by the appellant were "owned" by the Commodity Credit Corporation at the time they were taken. The reservation of a bare legal title by the Commodity Credit Corporation did not make it the "owner" at the time of the taking by the appellant, *after* the potatoes had been sold and delivered to Williamson, and paid for by him.

1. The Statute and Its Interpretation.
2. Federal Cases Dealing with the Interpretation of the Word "Owned."
3. A Trustee with Bare Legal Title is not an "Owner."
4. Conversely, the Person holding the Beneficial Interest is considered to be the Owner of the Property.
5. The Word "Own" refers to a Complete Property Ownership.
6. The Reservation of Title in a Conditional Seller does not make Him the "Owner."
    a. Taxation cases.
    b. Automobile liability cases.
    c. Annexation case.
    d. Charitable exemptions case.
    e. Forfeiture of vehicles under liquor laws.
    f. Insurance cases.
    g. Lien statute cases.
    h. Miscellaneous cases.

7. The Charterer of a Vessel may be considered the "Owner."

8. The "Possessor" is frequently considered to be the "Owner."

9. Other cases.

10. Summary of Evidence Regarding Sale.

B. There was not substantial evidence that the appellant intended to *steal* the property which he took, or commit any other penal offense with regard to it. All the evidence showed that the appellant thought the property belonged to Williamson, and that Williamson was such a close personal friend that it was inconceivable for the appellant to have taken anything from him with intent to steal it.

C. The District Court erred, to the prejudice of the appellant, in admitting evidence that two days *after* the date of the alleged offense, the appellant entered into a contract with the Commodity Credit Corporation for the purchase of potatoes for livestock feed.

The principal factual issue of the case was whether the appellant intended to *steal* the potatoes which he took. This rested upon the Government's claim that the potatoes were owned by the Commodity Credit Corporation and appellant knew that to be the situation when he took the potatoes. Appellant denied any knowledge of the claimed ownership interests of the Commodity Credit Corporation

and set forth his belief that the potatoes belonged to his friend Williamson. Appellant's relationship with Williamson was such that if he believed the potatoes were Williamson's, whether they acually were or not, no intent to steal them could have been found by the jury.

The erroneous admission of the evidence in question prejudicially affected the appellant's case because the jury apparently confused the activities of Williamson in buying the potatoes from the Commodity Credit Corporation *before* the date of their taking, with the action of the appellant in arranging a contract for the purchase of potatoes *after* he had discovered the quality of the potatoes and had diverted them. The improperly admitted evidence was probably used by the jury as a basis for concluding that appellant knew the technical wording of the sales contract signed by Williamson a week before.

II. THE COMMODITY CREDIT CORPORATION DID NOT OWN THE PROPERTY TAKEN.

At the time of the taking involved, the Commodity Credit Corporation did not own the potatoes which are the subject of this action. By its contract with Williamson, and the acts which followed before the potatoes were taken by appellant, the Corporation had lost possession and the right to possession to the potatoes. It had delivered the potatoes and the right to possession of them to Williamson,

who was entitled to them. It had received full payment under its contract. The contract contained a covenant that the potatoes would be used for livestock feed, but the Corporation reserved no right of repossession, rescission or forfeiture of the contract and return of the property in the event the covenant was breached. On the contrary, the corporation covenanted with Williamson for the complete disappearance of the potatoes and for a civil penalty. (Pl. Ex. 4, 5, R 308-313). The Commodity Credit Corporation was deprived by appellant of none of the attributes which are associated with ownership. He neither deprived it of possession, value, or use, since it neither had nor was entitled to any of them at the time the appellant took the potatoes.

The appellant contends that since the Commodity Credit Corporation had sold the potatoes to Williamson, and had vested him with all attributes of ownership except the bare legal title, the Corporation did not *own* the property at the time it was taken.

1. The Statute and Its Interpretation.

15 U.S.C.A.§714m(c) (Sec. 15(c), Public Law 806, Laws of the 80th Congress) under which this indictment was brought, provides as follows:

"(c) Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or that of another

> property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000.00 or by imprisonment for not more than five years, or both."

The appellant is charged with stealing, removing, or converting to his own use property "owned" by the Commodity Credit Corporation. No other portion of the penal provision of the statute is relevant.

It should be noted that the statute does *not* punish the taking of "property of which the *legal title* is held by the Commodity Credit Corporation," nor does it punish the taking of "property *sold on a conditional sales contract* by the Commodity Credit Corporation."

It is axiomatic that penal statutes are to be construed strictly against the Government. *14 Am. Jur., Criminal Law, Sec. 19, page 774. 14 Am. Jur., Criminal Law, Sec. 20, Page 776.*

From the above authorities it is apparent that statutes creating crimes cannot be extended by intendment, and that such statutes must be construed favorably to the liberty of the citizen.

This point is clearly set forth in the case of *U. S. vs. Ninety-Nine Diamonds,* 8 Cir., 139 F. 961, 964, in which the Court stated as follows:

> "But a penal statute which creates and denounces a new offense should be strictly construed. A man ought

not to be punished unless he falls plainly within the class of persons specified by such a statute. An act, which is not clearly an offense by the express will of the Legislative Department of the Government, must not be made so after its commission by the interpolation of expressions or by the expunging of some of its terms by the judiciary. The definition of offenses and the classification of offenders are legislative, and not judicial, functions; and where, as in the case at bar, a penal statute is plain and unambiguous in its terms, the Courts may not lawfully extend it to a class of persons who are excluded from its effect by its words, because, in their opinion, the acts of the latter are as mischievous as those of the class whose deeds the statute denounces. It is the intention expressed in the statute and that alone to which the Courts may give effect. They may not assume or presume purposes and intentions that the terms of the statute do not indicate, and then enact or expunge provisions to accomplish those supposed intentions."

The Congress could have provided specifically, with regard to any such taking as occurred in this case, that it would be a crime to steal from such a purchaser as was Williamson. Federal statutes have made a Federal offense the taking of property from a railroad car, a station house, or a steamboat, which is moving as an inter-state shipment. And it should be noted that in the statute applicable here the Congress specifically covered situations in which property was *held by* or *mortgaged* or *pledged* to the Commodity Credit Corporation. This indicates that of those classes of situations in which less than complete ownership was involved, only those *specifically* set forth were intended by the Congress to be proscribed by the statute.

It is also significant that no Federal administrative regulation embodies the language of the so-called Form 111 (Pl. Ex. 5; R 310-313) or provides for the retention of title or ownership in the Government in accordance with the provisions of that form.

2. *Federal Cases Dealing with the Interpretation of the Word "Owned."*

In a large number of cases, the Courts have construed the meaning of the word "owned," holding that *the retention of title did not make the party retaining it the owner.* First will be taken up the cases which arose in the Federal Courts. These deal with many different factual situations which will be referred to briefly.

In *Baltimore Dry Dock and Shipbuilding Corporation vs. New York & T. R. S. S. Company,* 4 Cir., 262 F. 485, the Court had occasion to determine the meaning of the words "owned by." It stated that those words meant "an absolute and unqualified title."

Couture vs. United States, 8 Cir., 256 F. 525, 526, involved an indictment under a statute providing punishment for "stealing property of the United States." The charging portion of the indictment stated that the horse was

> "Then and there the property of the United States of America and held in trust for an Indian known as Edward Takes-the-Shield, of the Standing Rock Indian Reservation; the then Edward Takes-the-Shield being

then and there an Indian under the charge of a superintendent of an Indian Reservation."

In reversing a judgment of conviction, upon the ground that the property stolen "was not the property of the United States," the Court stated in part as follows:

"The Trial Court had jurisdiction to punish the stealing of property of the United States, but it had no general common law jurisdiction to punish the stealing of the property of anyone within its territorial jurisdiction. Before a man could be punished, his case must be plainly and unmistakably within the statute. (Citing case). An offense which may be the violation of a criminal procedure is an act committed or omitted in violation of a public law either forbidding or commanding it. (Citing case). There are no common law offenses against the United States. (Citing cases). It must be conceded, we think, that the property stolen from the possession of Takes-the-Shield was not the property of the United States within the meaning of Section 47 of the Penal Code."

In three different related cases dealing with this subject, the United States Supreme Court, a Circuit Court for California, and a District Court for California held that the word "owner" referred to a person holding more than just the bare legal title.

One Hyde was charged with the violation of the Federal Land Settlement Law. A Federal statute provided for the exchange by an "owner" of property of the land owned by him, for other property which he could obtain from the Government. Hyde and his associates obtained *legal title*

to tracts of land and endeavored to exchange them for other properties, contending that as the holder of the legal title he was the "owner" of the lands he was endeavoring to exchange, under the wording of the statute.

In *Hyde vs. Shine,* 199 U. S. 62, 82, 50 L. Ed., 90, 96, 25 S. Ct. 760, the Court said that

> "Although the word 'owner' has a variety of meanings, and may, under certain circumstances, include an equitable as well as a legal ownership, or even a right of present use and possession, it implies something more than a bare legal title, and we know of no authority for saying that a person in possession of land under a void deed can be regarded as the owner thereof."

In *Ex Parte Hyde,* (C. C. Cal.) 194 F. 207, 215, the Court stated,

> "The conspiracy in this case is charged to be the claim of ownership of land by the accused, the title to which they had obtained fraudulently from the State, leaving the equitable title in the State, and the exchange of a legal title alone for which the Government had a perfect title and would convey, in exchange, a perfect and indefeasible title. 'Ownership' means the possession of the full and complete title. The books are full of decisions to that effect."

In *U. S. v. Hyde* (D. C. Cal.) 132 F. 545, 548, the Court stated that the word "owner" means the person with both legal and equitable title—the owner of a perfect and complete title. The Court also held that the owners of a "bare legal title" were not "owners" of the property.

A case involving an interpretation of an Internal Revenue Bureau regulation with the force and effect of law was *City Bank Farmers Trust Company vs. Hoey,* 2 Cir., 125 F 2d 577, 579. The regulation in question provided a transfer tax on a merger in which stock "owned by" the corporation was taxed. The case involved a situation in which the taxpayer corporations transferred stock as to which they had only the *legal title.* The question was whether such stocks were "owned by" the corporations and the transfers therefore taxable. The Court stated,

> "We agree with appellee that 'owned' means 'beneficially owned' and that this case does not fall within the provisions, since here the stocks were not 'owned' beneficially by the merging bank."

This case was followed by the case of *State Street Trust Company vs. Hassett,* (D. C. Mass.) 45 F. Supp. 671, 675, in which the Court stated that the word "owned" meant "beneficially owned."

Note also the cases of *Welch vs. Davidson,* 1 Cir., 102 F. 100, 102, and *Rheinstrom vs. Commissioner of Internal Revenue,* 8 Cir., 105 F. 2d 642, 646, in which the courts confirmed that in equity the beneficiary of a trust is the "owner" of the property which is the subject of the trust.

In re Stitt, 6 Cir., 252 F. 1 was a bankruptcy case. The statute in question providing for exemptions stated that they would not be granted to one who was "the owner of

the homestead." A bankrupt with title to a homestead, which did not sell for enough to pay the mortgages against it, was held not "the owner of a homestead" and therefore entitled to an allowance of exemptions from personalty, the Court holding in essence that the person with the bare legal title only to homestead property was not the owner of it.

American Basket Co. vs. Farmville Insurance Co., (C. C. Va.) 1 Fed. Cases 618. The plaintiff's policy of fire insurance with the defendant required that the assured should be "the entire, unqualified, and sole owners for their own use and benefit." The plaintiff had bought property in the State of Deleware and paid for it in full and was in possession of it, but it did not hold legal title to the property because of a law of the State of Delaware prohibiting foreign corporations from owning real estate in Delaware. The Court held that since the beneficial title remained in the insured, the fact that the naked legal title was outstanding in another person did not prevent recovery upon the fire insurance policy.

For a similar holding that the conditional vendee of property could recover as "sole owner" under such a policy of fire insurance, see *Smith vs. Jim Dandy Markets, Inc.*, 9 Cir. 172 F. 2d 616.

In *Central Vermont Transportation Co. vs. Durning*, 294 U. S. 33, 37, 79 L. Ed. 741, 745, 55 S. Ct. 306, the Court

considered the Federal maritime statute which required vessels operating in the United States coastwise trade to be "owned" by United States citizens. The corporation owning the vessel in question was a Maine corporation which was in turn owned by a Vermont corporation, and the stock of the latter was owned by a Canadian citizen. Under this state of facts, the Court found that the Maine corporation was not "owned" by a United States citizen under the words of the statute.

Slater Trust Co. vs. Randolph-Macon Coal Company, (C. C. N.Y.) 166 F. 171, involved a covenant in a mortgage of real estate that the mortgagor was the "owner." The Court construed this word to require absolute ownership in fee simple, with all the rights and interests belonging to the property.

The case of *Midland Oil Company vs. Thigpen,* 8 Cir., 4 F. 2d 85, 91, involved the defendant's liability to third persons by reason of the actions of a lessee under a lease from the Government. The Court stated that "a tenant or occupant of premises having the entire control thereof is, so far as third persons are concerned, the owner."

Under tariff statutes with reference to liability for duties on goods imported, the consignee has been held the "owner and importer," as respects the liability for duties. *U. S. vs. Bishop,* 8 Cir., 125 F. 181; *Blumenthal Print Works vs. United States,* (D. C. La.) 51 F. Supp. 208.

To the effect that more than a mere legal title must have been held by the Commodity Credit Corporation, for the conviction in this case to be sustained, is 2 Cyclopedia of Criminal Law, 1923 Edition, Sec. 751, Page 1246. "Usually larceny may be committed by stealing from any ownership whatsoever, regardless of the kind. *But to sustain a prosecution under the Federal statutes for stealing property of the United States, it must be alleged and proved that the articles taken were in fact the property of the United States.*" (Citing *Thompson vs. United States,* 2 Cir., 256 F. 616, cert. den. 249 U. S. 617, 63 L. Ed. 804, 39 S. Ct. 391).

In another case the indictment charged theft of property of the United States, but the proof showed theft of property of the Defense Plant Corporation, the stock of which was owned by the United States. The conviction was reversed upon appeal by the Court of Appeals. *Cartwright vs. United States,* 5 Cir., 146 F. 2d 133.

Two additional cases hold that the seller of a boat who retained the bare legal title as security for payment of the purchase price was not the "owner" within a statute respecting the limitation of liability. *American Car & Foundry Company vs. Brassert,* 7 Cir., 61 F. 2d 162, 164; *Munson Steamship Line vs. Commissioner of Internal Revenue,* 2 Cir., 77 F. 2d 849, 850.

3. *A Trustee with Bare Legal Title is not an "Owner."*

The position of the Commodity Credit Corporation in this case, as the holder of the bare legal title, may be likened to that of a trustee who has legal title but no beneficial interest. The authorities hold that such a trustee is not an "owner."

The American Law Institute's Restatement of the Law of Trusts states as follows:

> "Sec. 2. (d) Title and Ownership. The term 'owner' is used in the Restatement of this Subject to indicate a person in whom one or more interests are vested for his own benefit. The person in whom the interests are vested has 'title' to the interests whether he holds them for his own benefit or for the benefit of another. Thus the term 'title' unlike 'ownership,' is a colorless word; to say without more that a person has title to certain property does not indicate whether he holds such property for his own benefit or as trustee."

The cases of *McIntyre vs. Easton and A. R. Co.*, 26 N. J. Equity 425, and *Farmers Loan and Trust Company vs. Essex,* (Kan.) 71 Pac. 269, 270, hold that the word "trustee" is opposite of the word "owner" and that a trustee has legal title but no beneficial interest; a mere naked trustee is therefore held not to be an "owner."

In *Engineering Society vs. Detroit,* (Mich.) 14 N. W. 2d, 79, 83, a trustee had naked legal title, but the property was held to be "owned" by the beneficiary of the trust.

A recent case holding that the beneficial owner of property is the owner rather than the holder of the mere legal

title is *President, etc. of Middlebury College vs. Town of Hancock,* (Vt.) 55 A. 2d 194, 197. Likewise, in *Trustees of Iowa College vs. Baillie,* (Iowa) 17 N. W. 2d 143, 146, the court stated:

> "Was the real estate 'owned' by Grinnell College as a part of its endowment fund, within the meaning of the exemption statute? The word 'owned' as used in said statute means equitable or beneficial ownership rather than legal title."

A case holding that a lessee under a ninety-nine year lease which was renewable forever was the "owner," as distinguished from a trustee with legal title to the property, is that of the *Welfare Federation vs. Glander,* (Ohio) 64 N. E. 2d 813, 823.

4. *Conversely, the Person Holding the Beneficial Interest is Considered to be the Owner of the Property.*

In *Sommers vs. City of Wanwatosa,* (Wis.) 23 N. W. 2d 485, the Court held that the person who had the beneficial interest in a tax sale certificate for county land was the "owner" of the certificate.

A Massachusetts statute exempted from taxation property which was owned by a charitable corporation. Taxing authorities attempted to tax the property of which the legal title was in a non-charitable corporation, with the beneficial interest held by a charity. The Court concluded that the case fell within the statutory exemption

as the property was "owned" by the holder of the beneficial interest. *Assessors vs. Trustees* (Mass.) 6 N. E. 2d 363.

The case of *Martin vs. State Insurance Company*, 44 N. J. Law, 485, involved a condition in an insurance policy by which the policy insured the "owner." The Court held that an individual who held the equitable ownership of the property was "owner," and protected by the policy of fire insurance, though the bare legal title was held by another person.

Similarly, the case of *Watertown Fire Insurance Company vs. Simmons,* 96 Pa. 520, is one in which the Court holds that the insured is the "absolute owner" although a dry trust of legal title is in another person.

5. *The Word "Own" Refers to a Complete Property Ownership.*

The A. L. I. Restatement of Property discusses the term "ownership" as follows:

> "Sec. 10 (b) Ownership of a thing. A person who has the totality of rights, powers, privileges, and immunities which constitute complete property in a thing (§ 5 Comment e) is the 'owner' of a 'thing,' or' owns' the 'thing.' The word 'thing' is substituted in this connection for the term 'interest in the thing,' that is, the ownership is predicated of the physical objects and not of the interest. This usage is well established and is followed in this Restatement."

A number of cases enforce the conclusion that the

holder of a bare legal title cannot be considered the "owner."

The case of *Leigh vs. Green,* (Neb.) 6 N. W. 1093, 1096, holds that the word "owner" in the popular sense has the meaning "absolute owner."

A definition of the term "owner" appears in the case of *Miller-Link Lumber Co. vs. Stephenson,* (Texas) 265 S. W. 215, 220. In that case the Court states that the "owner" is "one who has dominion of a thing, real or personal, corporeal or incorporeal, which he has the right to enjoy and to do with as he pleases, either to spoil or destroy it as far as the law permits, unless he is prevented by some agreement or covenant which restrains his rights."

Similarly, in *West vs. Washington C. & R. R. R.,* (Ore.) 19 Pac. 666, 672, the Court defines an owner as one "who has dominion over a thing which he may use as he pleases, except as restrained by law or by agreement."

The following cases hold that the word "owner," standing alone, signifies an *absolute owner,* as an owner in fee simple, and not a qualified or limited interest in the property:

Phillips vs. Hardenburg, (Mo.) 80 S. W. 891, 895.
Bowen vs. John, (Ill.) 66 N. E. 357, 358.
Hankinson vs. Riker, 30 N. Y. S. 1040, 1043.
McCarthy vs. Hansel, 4 Ohio Appeals 425.

Wright vs. Bennett, 4 Ill. 258, 259.

6. *The Reservation of Title in a Conditional Seller does not make him the "Owner."*

The cases dealing with this phase of the subject will be divided into several subheadings and classified accordingly.

a. *Taxation cases.*

The following cases deal with taxes which are assessed against the person who "owned" the property in question.

In *Landis Machinery Co. vs. Omaha Merchants Transfer Co.,* (Neb.) 6 N. W. 2d 380, 383, the Court stated as follows:

> "The fact that the tax must be levied on the owner of property does not necessarily mean the holder of the title. In a conditional sale title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary incidents of ownership. The buyer has the use of the property to the complete exclusion of the seller, subject only to the seller's remedy in case of default, and both in a practical and a legal sense the buyer is the beneficial owner." (Citing cases).

In *Ken Realty vs. State,* (Ala.) 25 So. 2d 675, 166 A.L.R. 588, the plaintiff corporation was purchasing land from the United States under a conditional sales contract. The Court nevertheless held that the plaintiff purchaser was the "owner" and that it had the risk of loss or damage and

could sell or lease subject to the right of the Government to enforce its claim under the sales agreement.

To similar effect see the case of *Bowls vs. Oklahoma City,* (Okla.) 104 Pac. 902.

b. *Cases considering the liability of a purchaser under statutes involving the "owner" of an automobile will now be considered.*

In *Hansen vs. Kuhn,* (Iowa) 285 N. W. 249, 252, the Court held that the purchaser of a truck on a conditional sales contract was the "owner," stating that he became *"the beneficial owner, the equitable owner, the substantial owner, immediately upon the execution of the contract."* The Court continued,

> "Only the naked title remained in the seller, subject to being completely divested upon the receipt of the final deferred installment of the purchase price. Other than the matter of payment, such a sale transaction is in no way different from the absolute sale."

Similar holdings are found in the following cases:

Craddock vs. Bickelhaupt, (Iowa) 288 N. W. 109.

Hunt vs. Century Indemnity Company, (R. I.) 192 Atl. 799, 112 A.L.R. 902, 909.

Lennon vs. L. A. W. Acceptance Corporation, (R. I.) 138 Atl. 215, 216.

c. *Under an annexation statute* the conditional sales purchaser is considered the "owner." In the case of

Phoenix vs. State, (Ariz.) 137 Pac. 2d 783, 146 A.L.R. 1255, such a purchaser of real estate under a land contract was the "owner" and authorized to sign a petition to annex property to the city.

d. *The conditional sales vendee is the "owner" under tax exemption statutes.*

The cases of *Village of Hibbing vs. Commissioner of Taxation,* (Minn.) 14 N. W. 2d 923, and *Ritchie vs. City of Green Bay,* (Wis.) 254 N. W. 113, 95 A.L.R. 1081, held that the purchaser of property under a conditional sales contract was the owner under a taxing statute exempting property owned by charitable organizations. *The Hibbing case also held that the grantee of property under a deed containing a condition subsequent for return of the property to the grantor if the condition was breached was nevertheless the "owner."*

e. *Cases regarding the forfeiture of vehicles used in violation of liquor laws.*

The following cases hold that a purchaser under a conditional sales contract is the "owner" of a motor vehicle purchased by him, under the interpretation of statutes providing that such a vehicle can be forfeited if used by the purchaser in the violation of liquor laws. This conclusion is arrived at, regardless of the retention of legal title by another party.

State vs. One Pontiac Coach Automobile, (S. D.) 224 N. W. 176.

Weston Chevrolet Co. vs. Zehntfennig, (S. D.) 229 N. W. 307, 308.

Commonwealth vs. Bowers, (Pa.) 155 Atl. 605, 607.

In the Bowers case, the Court stated as follows:

"He (the seller) is not regarded as the owner in the common acceptance and understanding of the word. On the contrary, the buyer is regarded as the "owner" subject to the right of the seller to repossess himself of the vehicle for default, and if a car should be stolen from the buyer and used without his knowledge in the illegal transportation of intoxicating liquors, I have no doubt of his right to make claim for the vehicle as an innocent 'owner' within the provisions of the Act."

f. *Insurance cases.*

An insurance policy required the assured to be the "unconditional and sole owner" in order to recover against the company. In *Kurowski vs. Retail Hardware Mutual Indemnity Insurance Company,* (Wis.) 234 N. W. 900, the Court held that a purchaser under a conditional sales contract who was in possession held the equitable title and was such an "unconditional and sole owner" and "owner in fee simple."

A similar holding is found in *Dunning vs. Firemen's Insurance Company, etc.,* (S. Car.) 8 S. E. 318, 320.

g. *The conditional purchaser is the owner in lien statute cases.*

The following cases deal with statutory and other provisions for garagemen's or mechanics' liens. They hold that the *purchaser* of property under a conditional sales contract is the "owner" and "owns" the property for the purpose of the attachment of the lien:

Universal Credit Co. vs. Marks, (Md.) 163 Atl. 810.

Friedenbloom vs. Pecos Valley Lumber Company, (N. Mex.) 290 Pac. 797.

Knapp vs. Baldwin, (Iowa) 238 N. W. 542, 544.

Kerfoot vs. Sayles, (Okl.) 293 Pac. 1033.

Clark vs. Ingram, (Ala.) 160 So. 229, 230.

Ridgeway vs. Broadway, (S. C.) 75 S. E. 132.

Holstein Lumber Co. vs. Hansen, (Iowa) 201 N. W. 46.

Randolph vs. Christenson, (Ore.) 265 Pac. 797, 799.

Johnson vs. Soliday, (N. D.) 126 N. W. 99, 100.

Loomie vs. Hogan, 9 N. Y., 435, 61 Am. Dec. 706.

h. *Miscellaneous cases hold that the conditional sales purchaser is an "owner."*

In *Mesich vs. Board of County Commissioners,* (N. Mex.) 129 Pac. 2d 974, 976, the Court held that the purchaser of land under an executory contract of sale was an "owner" and that the seller held the legal title as a naked trust for the purchaser. Likewise in *Downey vs. Bay Street Railway Company,* (Mass.) 114 N. E. 207, the conditional sales vendee, rather than the person holding the legal title, was held to be the "owner."

A Tennessee statute gave a pedestrian injured by an automobile a lien against the automobile if at the time of the injury the vehicle was being operated by the "owner." In *Parker-Harris vs. Tate,* (Tenn.) 188 S. W. 54, the purchaser of such an automobile under a conditional sales contract was held to be the "owner."

Similarly, in the following cases the purchaser under a contract of sale, and not the individual holding the legal title to the property, was held by the Court to be the "owner":

In Re Farley, 153 N. Y. S. 271, 275 (regarding consent of owners of neighboring dwellings).

Garnett vs. Buss, (Kans.) 155 Pac. 2, 3, L.R.A. 1916 F, 1289 (action for damages to property).

Knapp vs. Ellyson Realty Co., (Ind.) 5 N. E. 2d 973 (right of possession after mortgage foreclosure).

Bone vs. Gowan, (Texas) 84 S. W. 385, 386 (right to buy contiguous state land).

Spellman Land & Securities Co. vs. Standard Investment Co., (Mo.) 238 S. W. 418, 422 (involving a redemption from a tax sale, and the Court states that the *"owner of an equitable title" is the "owner in the general acceptation of the term"*).

Friemann vs. Cummings, (Wis.) 200 N. W. 662 (vendor held not liable for defects in a building as "the owner" of the building).

7. *The Charterer of a Vessel may be considered the "Owner."*

In the case of *American Barge Line Co. vs. Jones &*

Laughlin Steel Corporation, (Tenn.) 163 S. W. 2d 502, 503, the Court holds that a charterer of a vessel to whom is transferred the command and possession and consequent control over its navigation is considered to be the "owner" for the voyage or service stipulated. Similar holdings have been announced in *Potter vs. American Union Line,* 185 N.Y.S. 842, 843, and *Herm vs. Williamson,* (Ohio) 25 N. E. 1.

8. *The "Possessor" is frequently considered to be the "Owner."*

In the case of *Thomas vs. Blair,* (La.) 35 So. 811, 813, the Court stated:

> "There is no substantial difference between the meaning of the words "possess" and "own." They are equivalent in common speech, and according to all the lexicographers."

Likewise, under statutes making the "owner" of a dog liable for injuries to persons bitten by the dog, the Court in the following two cases held that the person who had the dog in his possession and harbored it on his premises was the "owner" of the dog under the wording of the statutes:

Schulz vs. Griffith, (Iowa) 72 N. W. 445.

Hornbein vs. Blanchard, (Colo.) 35 Pac. 187.

9. *Other Cases.*

Other relevant cases not included in the above classifi-

cations, contain similar holdings. They show that the ordinary meaning of the term "owned" does not refer to one holding only a bare legal title after the property in question has been sold to another. They reveal that the holder of the beneficial interest is normally considered to be the "owner."

The case of *Elliott vs. Elliott,* (Kans.) 114 Pac. 2d 823, is a good example. This case involved a Kansas statute providing that property which was "owned" by a woman before marriage should remain her property in the event of divorce. The plaintiff wife had record title to the property in question and contended that this fact brought her within the statute. However, the Court distinguished "title" from "ownership." It pointed out that one could have title even if a trustee for another person, but that ownership involved the beneficial interest in the property. The plaintiff was held not to "own" the property, despite her record title.

In the case of *In Re Brigham's Estate,* (Iowa) 290 N. W. 11, the Court held that "the term 'owner' when used alone imports an absolute owner or one who has complete dominion of the property owned, as the owner in fee of real property." The case involves the question of what property had been "owned" by the decedent at the time of his death.

The case of *J. J. Anderson Lumber Company vs. Spears,*

(S. D.) 127 N. W. 643 holds that a person who has paid the consideration for the property is the "owner" of it within the terminology of a mechanics' lien statute, though the legal title to the property is held by another person.

The Court's attention is also invited to the case of *Ramsey vs. Leeper,* (Okl.) 31 Pac. 2d 852, 861. An Oklahoma statute authorized a municipality to condemn land in order to "own" it. Construing the meaning of the word "own" as used in the statute, the Court said it meant an unqualified vesting of title, and that the word standing alone and unqualified by reference to a lesser interest, meant a complete ownership of the property.

Note also the case of *McFieters vs. Pierson* (Colo.) 24 Pac. 1076, 22 Am. St. Rep. 388, which involves the "ownership" of a mining claim. The Court held that such ownership was established when the location was made and the locater had possession in compliance with the laws for acquiring title. Similarly, in the case of *State vs. Savidge,* 93 Wash. 676, 161 Pac. 471, the Court held that the claimant of a mining claim was the "owner," despite the fact that the legal title to the property was in the State.

10. *Summary of Evidence Regarding Sale.*

Unquestionably, the transaction between the Government and Williamson was a *sale* of potatoes by the Commodity Credit Corporation to Williamson. The agreements

(Pl. Ex. 4 and 5(R 308-313) use the terminology of sale throughout and describe such individuals as Williamson as the "'purchaser." Those documents refer to the *delivery* and method of *taking delivery.*

Furthermore, the evidence of the *Government* witnesses, and particularly the testimony of John Chinn with regard to the transaction, refer to the sale of the potatoes to Williamson and the purchase of them by him. (R 25-56). Williamson took delivery of the potatoes, and his receipts showing transfer of possession of the potatoes to him were introduced in evidence by the Government as Plaintiff's Exhibits 10 and 11. (R 323, 324).

Not only did the Commodity Credit Corporation sell these potatoes to Williamson, receive payment for them, and deliver them to him, but they contracted with him for the complete disappearance of the potatoes and further covenanted with him for the payment of a civil penalty. The Commodity Credit Corporation reserved no re-possessory, rescission or forfeiture rights with regard to the contract for the sale of the potatoes, or for the return of any of the property. That Corporation was deprived by the appellant of neither possession, value, or use of the property. How, then, can it be contended that he stole property belonging to it?

Had the Congress intended that Section 714m (c) of Title 15 U.S.C. apply to this situation, it could easily have

used precise language. It could have forbidden the taking of property of which the legal title was held by the Commodity Credit Corporation, or property which had been sold by the Commodity Credit Corporation on executory or conditional sales contracts. The Congress did not include such language, but used the words "owned or held by, or mortgaged or pledged to, the corporation," thus indicating its clear intention to punish as a felony the acts specifically referred to and them only. The ordinary and common meaning of the words used must prevail, particularly in a case involving one charged with the commission of a crime. The wording of the statute must be construed most favorably to the appellant, and the meaning adopted which has been placed upon the term "owned" by the many cases above cited.

The Commodity Credit Corporation undoubtedly has owned or held, or has had mortgaged or pledged to it, large amounts of property, just as other Government agencies have at times owned property. The statute in question here should be construed to fit the common and ordinary situations which it was intended to cover. When such circumstances are not presented by the evidence, the statute may not be unnaturally warped in an effort to cover a situation which is not within its plain meaning, nor in the understanding of the Congress which adopted it.

There being no proof that the property taken by the

appellant was "owned" by the Commodity Credit Corporation when it was taken by him, it having been sold by that agency and delivered to Williamson, the motions for judgment of acquittal which were presented to the District Court should have been granted.

III. THE APPELLANT HAD NO CRIMINAL INTENT TO STEAL THE POTATOES IN QUESTION.

The appellant's motions for judgment of acquittal should have been granted because there was lacking substantial evidence that the appellant intended to steal the property which he took, or to commit any other offense with regard to it. All evidence in the case indicated that the appellant believed the potatoes in question belonged to Williamson. It is not controverted that at the time of the taking, and at all times to and including the trial, Williamson was an extremely close friend and neighbor of the appellant, so much so that they used all of each other's property and equipment in a most informal manner. Furthermore, Williamson *gave* to the appellant an *entire truckload of potatoes* on the same day that appellant diverted the potatoes which he later sold. (R 180-1, 187-8). From this uncontroverted evidence, it is overwhelmingly clear that the appellant entertained no criminal intent in the diverting of the property which he thought was Williamson's.

To sustain the conviction in this case, the appellant court must be able to find that the evidence is more consistent with the guilt than with the innocence of the appellant. *Williams vs. United States* (Ct. App. D. C.) 140 F. 2d 351.

Further, it is pointed out in the case of *Hammond vs. United States,* (Ct. App. D. C.) 127 F. 2d 752, that unless there is substantial evidence of facts which exclude any other hypothesis but that of guilt, it is the trial court's duty to instruct the jury to return a verdict for the accused. In that decision the Court held that where all the substantial evidence is as consistent with innocence as guilt, the appellant court should reverse the judgment which was entered against the accused by the District Court.

Here, the evidence is just as consistent with the innocence of the appellant as it is with his guilt, even if the Court finds that the Commodity Credit Corporation owned the potatoes in question at the time they were diverted.

From the commencing of the first loading of the potatoes, until the last statement was given to the Government investigators, there was no effort at concealment or the avoidance of surveillance, by the appellant. It is true that some of the activities about which testimony was given occurred in the night-time, but the uncontroverted evidence and testimony with regard to the trucking operations of

the appellant, which are active commercial trucking operations in a busy agricultural community during the harvest time, was to the effect that all such trucking activities are on a *twenty-four hour basis* and *without regard to any regular daytime or daylight shifts.* (R 238, 341-2).

Such work as was done by the appellant in handling the diverted potatoes at night, was done with all the light available, and was of course readily observed by Government witnesses. (R 88).

It must be apparent that had the appellant desired to steal any property which he knew was *Government* property, he would certainly not have followed the open and apparent course of procedure which he took, and which, without any concealment on their part, was observed by many witnesses. A large part of the actions taken occurred on a main street of Sunnyside, Washington, in broad daylight on a summer afternoon.

On the other hand, if the appellant had intended to steal potatoes from his friend Williamson, which the Government has not contended, he certainly would not have done so in Williamson's own home pasture and close to his place of residence.

Many persons assisted the appellant in the loading and transportation of the potatoes in question to market. Most of them were called as witnesses at the trial to testify. They went into detail with regard to the handling of the

potatoes, and were unanimous in the evidence that at no time was any action taken which indicated a criminal intent on the part of the appellant. (R 235, 238, 241-2).

The appellant had every reason to believe that the potatoes he was handling were owned by Williamson and that he had at least the implied, if not the express consent of Williamson to do with them as he wished. Whether the potatoes were "owned" by Williamson, or by the Commodity Credit Corporation, the appellant certainly believed that they belonged to Williamson. (R 206). He had every reason to believe that, and substantial evidence of his intent to steal the potatoes is lacking in the record in this case.

IV. PREJUDICIAL EVIDENCE WAS ERRONEOUSLY ADMITTED BY THE DISTRICT COURT.

The appellant's motion for a new trial should have been granted because the District Court erred, to appellant's prejudice, in admitting evidence that two days *after* the date of the alleged offense, the appellant entered into a contract with the Commodity Credit Corporation for the purchase of potatoes for livestock feed.

The evidence in question was in the form of the sales contract and the Form 111 which was referred to in it. The contract was executed by a brother of the appellant for the appellant, on *August 25, 1948*. (Pl. Ex. 12, R 46, 144-9, 162, 255-8, 325-7). The District Court permitted the

first offer of the exhibit to be withdrawn, but left the contract and Form 111 in identification for later presentation and ruling. (R 46, 144-9, 162).

The indictment charged the appellant with taking potatoes on Monday, August *23*, 1948. The evidence showed that that date was the one upon which the diversion of the potatoes was commenced, although some final action was taken with regard to them on the next day. The diversion of the potatoes was entirely completed before any action was taken by the appellant with regard to the contract which is Plaintiff's Exhibit No. 12, and the action taken to purchase potatoes for livestock feed, after the diversion of the potatoes by the appellant had been completed, was entirely irrelevant to any issue in this case.

The appellant had about forty head of cattle, and had had an adequate period of time in which to observe the effect of feeding potatoes to them. (R 186, 200). Thereafter, he determined to purchase some additional potatoes for his livestock, but his action in that regard is totally disconnected from any element of the crime charged in the indictment (R 190). It is clear that the evidence of such other action is inadmissible because it was not connected with the offense charged in point of time, nor did it reveal anything with regard to the intent of the appellant. *Moyer vs. United States* (Ct. App. D. C.) 132 F. 2d 12.

The situation in this case is similar to that in which

evidence of *other offenses* committed by the defendant has been introduced, other than for the purpose of impeaching the defendant as a witness. It seems to be clearly established that in such cases the evidence of other offenses should be excluded, unless there is a direct tendency on the part of the evidence to prove the particular crime charged or some element of it. *Kempe vs. United States,* 8 Cir., 151 F. 2d 680, 687. *Eley vs. United States,* 6 Cir., 117 F. 2d 526, 528. *Martin vs. United States,* (Ct. App. D. C.) 127 F. 2d 865.

In the case of *Witters vs. United States,* (Ct. App. D. C.) 106 F. 2d 837, 840, 125 A.L.R. 1031, 1035, the Court had to consider the question of whether the lower court had properly admitted evidence of an offense which occurred subsequent to the offense charged. The Court stated:

> "The opinion of the Court is that upon the question of knowledge the cases, properly interpreted, make evidence of other offenses admissible only when it relates to *prior offenses or* to situations in which the offenses occurred *both prior and subsequent* to the offense charged in the indictment, and that, consequently, the admission of evidence of *subsequent* offenses for the purpose of showing knowledge was fatally prejudicial and necessitates a reversal of the judgment."

The evidence in question was not only improperly admitted, but the error of the District Court was prejudicial to the appellant.

Once the District Court had determined that the potatoes in question were "owned" by the Commodity Credit Corporation, after they had been sold and delivered to Williamson, the principal factual issue of the case was whether the appellant intended to steal the potatoes which he took. This rested upon the Government's claim that the potatoes were owned by the Commodity Credit Corporation and that the appellant *knew* such to be the case when he took the potatoes. Appellant denied any knowledge of the claimed ownership interest of the Commodity Credit Corporation and set forth his belief that the potatoes belonged to his friend Williamson. (R 206). His relationship with Williamson was such that if he believed the potatoes were Williamson's, whether they actually were or not, no intent to steal them could have been found by the jury. The evidence which was erroneously admitted apparently caused the jury to confuse the activities of Williamson in buying the potatoes from the Commodity Credit Corporation *before* the date of their taking by the appellant, with the action of the appellant in arranging a contract for the purchase of potatoes *after* he had discovered the quality of the potatoes which Williamson had given to him for his livestock. The improperly admitted evidence was apparently used by the jury as a basis for concluding that appellant knew the technical wording of the sales contract

which had been signed by *Williamson* a week before, and which *appellant* did not see until a month later. (R 191).

In case of doubt, the Court should hold that the erroneous admission of the evidence was prejudicial to the rights of the appellant. As pointed out in the cases of *Keliher vs. United States,* 1 Cir., 193 F. 8, 20, and *Nicola vs. United States,* 3 Cir., 72 F. 2d 780, a new trial should be awarded for the improper admission of evidence, *unless it appears beyond doubt that such evidence did not and could not have prejudiced the rights of the party duly objecting.*

And when the admission of improper evidence was prejudicial to the accused, he was held to be entitled to a new trial in the cases of *U. S. vs. Dressler,* 7 Cir., 112 F. 2d 972, and *U. S. vs. Campanaro,* (D. C. Pa.) 63 F. Supp. 811, 815.

Where, as in the instant case, it appears that evidence admitted over objection was irrelevant to all elements of the offense charged, and that it was prejudicial to the appellant, the error committed necessitates the granting of a new trial.

In conclusion, the judgment of conviction and sentence

which was entered by the District Court should be reversed.

Respectfully submitted,

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